

## Chapter One

# A Constitutional Turn for Deliberative Democracy in Europe?

*Jane Suiter and Min Reuchamps*

### **Deliberative democracy and its constitutional turn**

In recent years, public authorities and civil-society organisations, driven by increasing public disengagement and a growing sense of distrust between the public and their representatives, have been instituting exercises in public deliberation, often using ‘mini-publics’, that is relatively small groups of citizens, selected according to various criteria and representing different viewpoints, brought together to deliberate on a particular issue. From small-scale experiments, mini-publics have recently taken a constitutional turn, at least in Europe. Iceland and Ireland have turned to deliberative democracy to reform their constitutions. Estonia, Luxembourg and Romania have also experienced constitutional processes in a deliberative mode. In Belgium, the G1000, a citizen-led initiative of deliberative democracy, has fostered a wider public debate about the place and role of citizens in the country’s democracy. At the same time, the European Union institutions have introduced different forms of deliberative democracy as a way to reconnect with citizens. These empirical cases are indicative of a possible ‘constitutional turn’ in deliberative democracy in Europe. These examples of constitution-making happened in a particular time and place but they may also serve as models for other events.

The purpose of this book is, first, to critically assess these developments, bringing together academics who have been involved in designing these new forms of constitutional deliberative democracy with theorists practised in evaluating normative standards. This combination of contributors allows us the opportunity to speak across the praxis divide, bringing empiricists and those involved in the design and implementation of these processes, together with more normatively engaged theorists. Second, we hope to be able to offer answers or, at least, clues to possible pathways to generalisation as to which kinds of participatory processes work best for constitutional change and under what conditions.

In essence, deliberative democracy is concerned with building and engaging with authentic and reasoned debate in order to decide on a course of action. In other words, if it is deliberative, it is inclusive and consequential (Dryzek 2009). Deliberation can take place in mini-publics and parliaments and among the masses and there are many high-profile real-world examples of innovation in deliberative democracy, notably the participatory budgeting practices that originated in Brazil

(Souza 2001); the deliberative polling exercises that have been applied widely (Fishkin 2009; Suiter, Farrell and O'Malley 2014); and the long tradition in Scandinavia of citizen-deliberation about complex issues at the intersection between science and society (Rose and Sæbø 2010), to name but a few. All share some features: they are based on some form of deliberation among samples of citizens; they aim to foster positive and constructive thinking about solutions (they are not simply protest movements); they seek genuine debate about policy content; they seek solutions beyond adversarial politics; and they seek to identify common ground. What's more, there is cross-fertilisation of existing models and techniques and a rising number of experiments that combine traditional modes of political participation with some elements of deliberation. The field of deliberative democracy is kicking and striving.

But why should deliberative democracy be an appropriate mode for constitution-making? Modern constitution-making started in the late eighteenth century. Elster (1995) describes seven waves of constitution-making, across Europe and North America as well as in their former colonies throughout the world. The first wave came before the end of the eighteenth century, with the novel constitutions that followed the American and French revolutions. The second wave swept through Europe following the revolutions of 1848, when around fifty new constitutions were introduced, including those in the many small German and Italian states. In the third wave, many of the states newly created after World War I, for example, Poland and Czechoslovakia, wrote their constitutions. Under pressure from the victorious allied forces, in the fourth wave, the defeated states of World War II, Germany, Italy and Japan, wrote new constitutions introducing democracy. The fifth wave came with the breakup of the British and French colonial empires, starting in India and Pakistan in the 1940s, gradually gaining momentum and then running through Africa in the 1960s. The sixth wave washed through southern Europe in the mid 1970s, with the end of dictatorships in Greece, Portugal and Spain. The seventh wave broke in Eastern Europe in the 1990s, with the collapse of communism and the end of the cold war leading to the introduction of many new and progressive constitutions; this was also the case in Finland, where the constitution of 2000 is a product of the mini banking crisis in Scandinavia in the 1990s.

Many of these cases of constitutional revision have three characteristics in common. First, they were instigated in response to crises or exceptional circumstances. They each happened at what Ackerman (1998) refers to as a 'constitutional moment', which mobilised social forces for fundamental change. Elster (1995) counts only two instances in which new constitutions were drawn up under non-crisis circumstances: Sweden in 1974 and Canada in 1982. All the others were responses to economic crisis, regime-change or revolution. Second, all involved, though to varying extents, the deliberation of elites. Third, many of the recent bouts of constitution-making have not resulted in long-lived documents (Kellermann, de Zwaan and Czuczai 2001; Albi 2005; Ginsburg and Dixon 2011).

The cases discussed in this book (*see* Bergmann 2016; Suiter, Farrell and Harris 2016; and Jacquet, Moskovic, Caluwaerts and Reuchamps 2016,

Chapters Two, Three and Four of this volume) were also products of crisis, particularly of the global financial crisis of 2008, and of the diminishing trust in institutions among European publics in general. Indeed, both Ireland and Iceland suffered large drops in GDP as a result of the banking crisis. Yet, given the importance of constitution-making, should it not preferably be undertaken at a time when rational reflection and consideration is possible (Elster 1995)? It is possible that the deliberative mode of this recent wave has, at least to some extent, been an attempt to overcome citizens' diminishing trust in institutions and that they can be distinguished from all previous waves in terms of who was deliberating and how they were doing so. This is an issue to which we shall return to in greater depth in the relevant country chapters.

Given the characteristics of the current political context and also of deliberative democracy, is this mode likely to be appropriate for constitution-making? Previous rounds of constitution-making involved the deliberation of elites – principally, constitutional lawyers, senior politicians and so on – who constituted the deliberative component of such assemblies as the framers of the US Constitution and the Constitutional Assembly in post-revolutionary France. In most, decisions were reached by a simple majority of the delegates, although a few aimed at something close to consensus, for example, during the making of the 1949 German Constitution and the 1978 Spanish Constitution (Elster 1995). In several instances, however, citizens also had a role in constitution-making as well as elites (Fishkin 2011; Mendez and Wheatley 2013).

What is crucial in terms of constitutional deliberative democracy is that, in all cases, the central principle is an attempt to involve the public in deliberation. In this perspective, a version of the deliberative model involving a mini-public was the chosen route for the assemblies to deliberate. In addition, in terms of the how (or the throughput) of deliberation, Elster also noted that in many previous episodes of constitution-making, self-serving arguments tended to dress themselves in the garb of public interest. While there is no guarantee that a deliberative mini-public would not operate in a similar fashion, if it is functioning in conformity with deliberative criteria such as inclusiveness, equality transparency and publicity, it would not.

So why should a deliberative mini-public function in this normatively desirable fashion? Constitutions, as the supreme norms that shape legitimate law-making, must be normatively legitimate if citizens are to be considered under an obligation to obey the laws of their polity (Dworkin 1995). There is agreement in the literature that deliberative democracy is primarily focused on producing legitimate political outcomes (Manin, Stein and Mansbridge 1987; Cohen 1998). Thus, introducing elements of deliberative democracy to constitution-making ought to make constitutional changes more legitimate. The link between the mini- and the maxi-public (that is, the whole of the people) will also be crucial here and that is an issue we shall return to later. In addition, as Elster (1995) notes, creating a constitution involves making collective choices under constraints, that is, constitutions are works produced by constituent assemblies rather than by individuals. Thus, in general, the goals of individual constitution-makers and

the mechanisms by which these are aggregated into collective choices are vital. In theory, utilising the principles of deliberation should result in a process that functions so as to ground constitution-making in the thought-through will of the people.

In addition, the intrinsic importance of constitution-making requires that procedures be based on rational and logical argument: and the deliberative model is ideally suited to such tasks. Rawls (1999), for example, argued that deliberation should be central to a conception of public reason. Thus we might expect that constitution-making in a deliberative mini-public would result in policies and priorities being adopted that are better solutions than those that can emerge when framers are incentivised more towards horse-trading and log-rolling (Elster 1995). In other words, as Caluwaerts and Reuchamps (2015) argued, discussions that take place in the public sphere should have the capacity to translate the deliberation of the public into normatively valuable public outcomes. Thus, we would expect deliberative democracy to be appropriate for constitution-making, in that it will both give the process greater legitimacy and produce outcomes based on rational and logical argument.

However, there is still the issue of content. Constitutional deliberative democracy deals with issues that might, potentially, lead to a transformation of the polity; these deliberations also, potentially, need to include more abstract issues of principle and theory than some of the political issues traditionally associated with mini-publics. Many of the earlier mentioned examples of mini-publics are rooted in the practical, or the ordinary experiences of the public, focused on local spending, the environment and so on. However, the new wave of large-scale initiatives aimed at changing constitutions either directly or indirectly are, by their very nature, more abstract, less tied to the day-to-day realities of life, for the deliberating public. Yet there is no reason why some of these constitutional issues – from electoral systems, to marriage-equality, to producing new constitutions – should be beyond the competence of ordinary members of a mini-public to decide. The evidence from the wave of citizen-assemblies in Canada and the Netherlands (Fournier *et al.* 2011) is that citizens embraced the technical elements of the proposals and many became experts. In other, more general mini-publics, such as Ireland's We the Citizens experiment (Farrell, O'Malley and Suiter 2013; Suiter, Farrell and O'Malley 2014), members deliberated on both political reform and redistribution to produce more informed and nuanced opinions.

As a result of this widening of the parameters of what is deemed possible within deliberation, other forms of constitutional deliberative democracy have emerged, especially in Europe. In Iceland, the output of a deliberative process has been presented in a referendum that confirmed the will of the population to change the constitution. In Ireland, the Convention on the Constitution is now done with its first deliberations and two referendums have been held, including one introducing same-sex marriage. These can be seen as examples of deliberative constitutional reform. In Belgium, even though the G1000 was not designed to affect the constitution of the country, it is currently widely replicated in different

settings, in Belgium and elsewhere, and it has fostered a wider debate in society about the role and place of citizens in Belgian democracy (Caluwaerts and Reuchamps 2015). Last but not least, notably with the introduction of European Citizens' Initiatives, the European Union has paved the way for the introduction of new forms of democracy (Auer 2005). These developments also represent a number of forms and practices, including deliberative constitutional reforms (that is, constitutional reforms initiated via deliberative democracy procedures and not only by representative and/or direct-democratic ones); constitutional mini-publics (which are organised to deliberate about – some articles of – the constitution); and also deliberative events on issues that are not directly related to constitutional change but concerned with the nature of democracy in a polity (for instance, whether it should become more participatory and/or deliberative).

To sum up, the first two experiences discussed in the volume – Iceland and Ireland – are true examples of constitutional deliberative reform, while the latter – the G1000 in Belgium – is a *sui generis* form of deliberative democracy with a potential for political and constitutional transformation. We argue that, together, these can be envisaged as constitutional deliberative democracy and that there is now a need for a serious and systematic inquiry into these developments, which go to the heart of democracy. The choice of cases in this volume (Iceland, Ireland and Belgium) makes sense because all these cases were large-scale experiments and were similar from a methodological perspective. They call for a combined research endeavour, bringing together theoretical claims and empirical validations. Thus, this volume brings together not only theoretical and empirical researchers who have studied these cases but others who have been involved in the organisation of this constitutional turn in deliberative democracy.

In other words, we shall explore and reflect on innovations made in deliberative democracy as a result of its application to constitutional reform (Farrell 2014). This can be envisaged as a particular *form* of deliberative democracy – one that harnesses the democratic potential of mini-publics (Parkinson 2006; Pateman 2012) – or as instances of deliberative democracy in service of the masses (Niemeyer 2014). This is important, as the link between the mini- and the maxi-public is not yet fully conceptualised (Grönlund *et al.* 2014) and, in most cases, constitution-making is ratified by 'the people' at some point. Thus, while these constitutional deliberative processes are not themselves decision-making as proxies for mass-publics, they can be utilised for deliberation-making in mass publics. As Niemeyer (2014) argues, these mini-publics can distil, constrain and synthesise relevant discourse to be transmitted to the wider public. In at least two of our cases, in Iceland and in Ireland, this was the purpose of the mini-public: to act as a precursor to nationwide referendums on the same issues. In other words, to bring about a more discursive transmission of information rather than merely being information-providing (MacKenzie and Warren 2012). Importantly, these mini-publics can also act as capacity-builders; the media attention they generate and the open access they provide, at least potentially, means they can serve as deliberative exemplars, building and enhancing the reputation of deliberation more generally in society.



### Assessing constitutional deliberative democracy

Starting from some emblematic cases of constitutional deliberative democracy, this book will address the constitutional turn in deliberative democracy across Europe and, more specifically, assess the – multi-faceted – legitimacy of this transformation. To this end, we propose a framework for assessing the legitimacy of constitutional reform in a deliberative setting that distinguishes between three kinds of legitimacy: input, throughput and output legitimacy. This approach builds on the seminal work of Easton (1965), who demonstrated the importance of understanding any political system in terms of its input and of its output as well as in terms of their interactions. These two normative criteria of systems' theory have often been discussed in terms of democratic legitimacy, starting with Scharpf in the context of the EU (1970). He divided democratic legitimation into *output*, that is the effectiveness of the EU's policy outcomes, and *input*, that is the responsiveness of the EU to citizen-participation. More recently, Schmidt has argued for the addition of a third normative criterion for evaluation: *throughput*, that is, to study the efficacy, accountability, openness and inclusiveness of the democratic processes under consideration (2013).

In the case of the European Union, moreover, scholars have been paying increasing attention to the mechanisms of 'throughput' legitimacy, which have long been among the central ways in which EU-level institutional players have sought to counter claims about the poverty of input legitimacy and to reinforce claims to output legitimacy (Schmidt 2013: 3).

Throughput legitimacy is thus the missing link between input and output. Interestingly, theories of deliberative democracy bring about the same concern for a focus on processes, in addition to the input and the output dimensions. Emphasising the procedural dimension of deliberative democracy, Cohen contends that 'outcomes are democratically legitimate if and only if they could be the object of free and reasoned argument among equals' (Cohen 1998: 74). This proceduralist approach to democracy, which is in line with other deliberative theorists (for example, Manin, Stein and Mansbridge 1987; Dryzek 2001), links inputs from equal citizens with outputs, understood as the outcome produced through deliberation. Scholars working empirically on deliberative democracy's legitimacy also stress the importance of this threefold model (Bekkers and Edwards 2007; Edwards 2007): democratic decision-making procedures have to be legitimate in the input, throughput and output phases. That is to say, such procedures have to make sure that the opinions and needs of ordinary citizens are translated, through deliberative procedures, into good political outcomes (Caluwaerts and Reuchamps 2015).

Such a threefold model of democratic legitimacy makes even more sense in an era of systemic approaches to deliberative democracy (Parkinson and Mansbridge 2013), where legitimacy does not rely on separate mini-publics but on close interactions between mini-publics and maxi-publics. Nonetheless, if such an approach is to be useful in assessing constitutional deliberative democracy, it should be theoretically qualified and, on this basis, empirically tested, as the

remaining chapters of this book will do. Theoretically, we should define more precisely each of these three dimensions of deliberative legitimacy and how they could possibly be translated in practice. To this end, we adapt the analytical framework proposed by Caluwaerts and Reuchamps (2015) to the specificities of constitutional deliberative democracy.

### ***Input legitimacy***

It is often argued that a key dimension of deliberative democracy is the nature of the *representation* it allows. The question of *who* deliberates is crucial to understanding the input side. In this regard, lots of discussions have been about the principle of ‘all-affected interests’, which means that everyone affected by the issue at stake should be included in the deliberation; this raises the question of inclusion and democracy (Young 2000) and how inclusion can be operationalised in practice (Pedrini, Bächtiger and Steenburgen 2013).

Several answers can be given to the question of how deliberation should accommodate representation. It could call for socio-demographic representation; for discursive representation that would insist on a diversity of opinions and discourses rather than on a diversity of people; or a mixture of both. It could also be the case that the representation is biased, with self-selection and strong representation among all groups but, in particular, traditionally vulnerable groups. The technique used to delimit the *who* should also be under close scrutiny, as its consequences for representation can vary a lot depending on whether random selection, targeted selection or self-selection is in operation (Caluwaerts and Ugarriza 2012; Fung 2006).

Another key dimension of the input side is *agenda-setting*, that is, the *what* question. Fung has distinguished between ‘hot’ and ‘cold’ issues: the former might be of greater social and political interest but more productive of tension; the latter may provoke less tension but have less social resonance, within both the mini-public and the maxi-public (Fung 2007). Above all, how the agenda is decided is of crucial importance to understanding the dynamics of constitutional deliberative democracy. Several ways of agenda-setting, each fostering different consequences, can be found in practice. The process could have an open agenda: the entire population or all stakeholders are able/invited to set or vote on the agenda in an open-ended process. At the other hand of the spectrum, the agenda could be closed, decided on by formal institutions and with little room for introducing new issues. In-between options are also available. For instance, the agenda could be fixed but participants could also be allowed to introduce adjacent issues and question whether pre-chosen issues should be on the agenda at all.

A last dimension of the input side is the level of information of the people who deliberate, which can be referred to as ‘epistemic completeness’ (Mucciaroni and Quirk 2006). More specifically, it is not so much what deliberators know but how they can learn about the issues at stake. Ideally, participants have access to all relevant information and are – made – competent, with access to experts on the question, policy-makers and/or witnesses. In practice, however, efforts to inform

deliberators may be limited to information booklets, with little room for extra learning and questioning. We can also see the interactions – and possibly the trade-offs – between the different dimensions of the input side. For instance, if the aim is to build constitutional deliberative democracy involving a large and diverse crowd of people, the question of information is even more important, to ensure sufficient epistemic completeness. Above all, while there are interactions *within* the input side, there are also interactions *between* input, throughput and output legitimacy, to which we turn now.

### *Throughput legitimacy*

Deliberative democracy strongly emphasises the importance of the nature of the deliberation itself. In this regard, *representation* is not the only key question: the question of *participation* is also critical. To what extent are the participants given the chance to take part in deliberation? There might be substantively inclusive – not just formal – participation: every participant is given an equal voice in the discussion and efforts are made to create a genuine group feeling, in order to lower the threshold of participation. There might be a difference between ‘real’ and ‘formal’ inclusive participation, however: in the latter, participants would be given equal speaking time formally but no extra effort would be made to ensure that less at-ease participants benefit from the deliberation. Instead, the discussions might then be characterised by exclusion and patterns of discursive domination. Several factors might have an impact on the nature of participation: for instance, the role of the facilitators (Myers 2007); group-composition (Caluwaerts and Deschouwer 2013) and, more specifically, the gender balance among participants (Mendelberg, Karpowitz and Goedart 2014); and the use of multiple languages (Caluwaerts and Reuchamps 2014).

Another dimension of the throughput side is the question of how deliberation is translated into decision. This co-ordination can occur through transformation, that is, solution-finding through discussion. Yet because politics is more about conflict than consensus (Mouffe 2000), other options exist, such as a combination of discussion and voting or simply voting; and there is a place for voting in deliberative democracy (Saward 2008: 67–8). The question raised by the choice between these different options, however, is what are the possible consequences of the voting mode on the quality of deliberation itself? This is why attention should be paid to this dimension of throughput legitimacy. Above all, as Schmidt has argued for the throughput dimension within the EU (2013), the transparency of processes seems to be crucial to their legitimisation.

In most instances, constitutional deliberative democracy will rely on a portion of its whole public, a mini-public. But the link between this mini-public and the maxi-public is a key dynamic that has an impact on both the throughput side and the output side. For the former, the question is the contextual dependence or independence of the mini-public. While there will always be connection between the mini-public and the maxi-public, deliberation could take place largely in a



political and public vacuum; or it could be the case that some political actors and media aim to steer participants' decisions in a certain direction and thus undermine the legitimacy of the event. The contextual independence of the deliberation should therefore be taken into account when assessing the legitimacy of constitutional deliberative democracy.

### ***Output legitimacy***

With output legitimacy we come to the core of the relationship between the mini-public and the maxi-public. As Dryzek puts it: 'decisions still have to be justified to those who did not participate' (2001: 654). The question of political uptake is therefore crucial in assessing constitutional deliberative democracy; that is, how the society at large takes up the issues raised by the mini-public. It is also in close interaction with the nature of the representation and of agenda-setting on the input side. In the chosen conception of the input dimension, choices may already have been made that have an impact directly on the likely political uptake. For instance, it could have been decided from the very beginning that any recommendations from the constitutional deliberative forum would be put to the popular vote in a referendum. Feedback from the mini-public to the maxi-public could also be organised through more informal means, such as by televising the deliberations or through possible interactions between the maxi-public and the mini-public during the process itself – therefore having a beneficial effect on the throughput legitimacy. The question of what is politically or even, in this case, constitutionally, done with the results of deliberative democracy is a key dimension of its output legitimization.

The corollary is that there is a need for some sort of accountability from the formal constitutional actors, likely to be parliamentarians but also, possibly, the government, to the mini-public and to the maxi-public. In this regard, there could be regular feedback: government agents report on the decisions and progress made to participants and the general public. It could also be the case that feedback is provided only on demand by participants or simply that the maxi-public and participants are kept in the dark about the uptake of their proposals.

Last but not least, even though the focus should be on potential constitutional changes brought about through deliberative democracy, we should not put aside the potential social uptake of deliberative processes. The process of constitutional deliberative democracy could foster social changes as the decisions and/or the model of deliberation is taken up by other groups, to be reproduced on a smaller scale. Minimally, we could expect an increased awareness of the constitutional deliberative process and of its proposals among the public at large. Nonetheless, research on citizens' assemblies on electoral reform in Canada and in the Netherlands has shown that large portions of the society were not aware of the deliberative-democracy processes in motion (Fournier *et al.* 2011). The social – and not only political – uptake induced – or not – by constitutional deliberative democracy should therefore be assessed in any endeavour to gauge its legitimacy.

**Analysing constitutional deliberative democracy**

The chapters in this book use this three-fold legitimacy analytical framework to assess the legitimacy of constitutional deliberative democracy and reflect on the transformation of our current democracies it might make possible. The first three chapters apply the framework to the cases of Iceland – in Chapter Two by Eiríkur Bergmann; Ireland – in Chapter Three by Jane Suiter, David Farrell and Clodagh Harris; and Belgium – in Chapter Four, by Vincent Jacquet, Jonathan Moskovic, Didier Caluwaerts and Min Reuchamps. These chapters bring together a very rich supply of empirical material and they form a comprehensive analysis that the remainder of the book's chapters will draw on for their analysis.

In Chapter Five, Brigitte Geissel and Sergiu Gherghina perform a comparison of these three country-cases in light of the literature on democratic innovations, which sheds light on input, throughput and output legitimacy dynamics in a comparative fashion. In the wake of this comparative assessment, in Chapter Six, Julien Talpin discusses the legitimacies, as he calls them, of constitutional deliberative democracy and highlights the difficult move from mini-publics to deliberation in the public sphere, raising the question of how constitutional reforms can be deliberative. Kimmo Grönlund, in Chapter Seven, brings in additional empirical material from five experiments organised in Finland that allows him to delve into the designing of mini-publics for constitutional deliberative democracy.

All this empirical material is taken further by Stefan Rummens in Chapter Eight, in which he develops six theses about the legitimacy of mini-publics in the democratic system. The closing Chapter Nine, by John Parkinson, offers a conceptual conclusion that connects the key themes of this volume with the emerging deliberative-systems approach, to ask both how deep these constitutional innovations run and how deep they can and should run. All in all, this book seeks to open up a deliberation about the constitutional deliberative democracy turn.

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